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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

AMICUS CURIAE BRIEF OF THE AMERICAN LIBRARY ASSOCIATION IN SUPPORT OF APPELLANTS.

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INTEREST OF THE AMERICAN LIBRARY ASSOCIATION.

The American Library Association, founded in 1876, is a non-profit educational organization with its principal place of business located in Chicago, Illinois. Its membership includes more than 30,000 libraries, librarians, library trustees and members of the general public who are devoted to the development and improvement of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America, and, to a considerable extent, throughout the world. Through its membership and its affiliation

with its constituent state library associations, the American Library Association represents over 29,000 public, university and special libraries, over 90,000 elementary and secondary school libraries and media centers, and over 120,000 librarians.

The American Library Association is an institution unique to American culture and tradition. Through libraries, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films and other materials which they require or desire to satisfy their intellectual, emotional, recreational or professional interests.

In providing this service in the free society mandated by our Constitution, it is and has been the responsibility of libraries to make available books and other materials presenting all points of view concerning the problems, issues and attitudes of the times. Libraries and librarians have, therefore, historically resisted efforts to limit their collections to only those materials reflecting attitudes, ideas and literary styles bearing the imprimatur of governmental authority or the approval of the prevailing majority of the populace. As a result, the American library has become, in many respects, the nation's most basic First Amendment institution. Indeed, libraries serve as a primary resource for the intellectual freedom required for the preservation of a free society and a creative culture.

The interest of the American Library Association in the decision of the United States Court of Appeals here under review relates to the constitutional standards governing the *scienter* requirement in criminal obscenity prosecutions.

This issue has been before this Court before, but in each instance the Court has elected to defer its consideration.

Thus, in *Smith* v. *California*, 361 U. S. 147, 154 (1959), the Court stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; . . ."

Subsequently, when the issue was raised in *Mishkin* v. *New York*, 383 U. S. 502, 511 (1966), the Court was able to construe Section 1141 of the New York Penal Law so as to make ". . . it unnecessary for us to define today 'what sort of mental element is requisite to a constitutionally permissible prosecution.'"

In *Redrup* v. *New York*, 386 U. S. 767 (1967), the Court originally granted certiorari in order ". . . to consider the standards governing the application of the scienter requirement announced in *Smith* v. *California*, 361 U. S. 147, for obscenity prosecutions," 386 U. S. at 771 (J. Harlan dissenting). After argument, however, the Court concluded that the case should be decided without consideration of such standards, but

> ". . . without prejudice to the questions upon which review was originally granted." 386 U. S. at 770.

Mr. Justice Harlan dissented with Mr. Justice Clark and expressed the view that ". . . the issues for which the cases were taken should be decided." 386 U. S. at 772. Justice Harlan went on to say that he deemed it appropriate to defer an expression of his own views on the issue "until an occasion when the Court is prepared to come to grips with such issues." 386 U. S. at 772.

We submit that this case is such an occasion and that the resolution of this issue can no longer be deferred.

The June 21, 1973 decisions of this Court* involved a general reconsideration of the standards by which obscenity will be defined and judged. Significant as these standards are, the standards of due process which will govern their application are equally, if not more significant. As Mr. Justice Brennan correctly noted in his concurring opinion in *Manual Enterprises* v. *Day*, 370 U. S. 478, 497 (1962):

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* *Miller* v. *California*, 413 U. S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973); *Kaplan* v. *California*, 413 U. S. 115 (1973) *United States* v. *12 200-Ft. Reels of Super 8MM Film*, 413 U. S. 123 (1973); and *United States* v. *Orito*, 413 U. S. 139 (1973).

> "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged."

If, as this Court held in *Miller* v. *California*, 413 U. S. 15, 26 (1973)

> ". . . we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide . . . "

it is essential that this Court define clearly the nature and scope of such safeguards. Not the least of these safeguards is the "sort of mental element . . . requisite to a constitutionally permissible [obscenity] prosecution." *Smith* v. *California*, *supra*, 361 U. S. at 154.

It is no overstatement to assert that this Court's resolution of this issue will decisively affect the future development and utilization of libraries and library resources in this country. The outcome of this issue can well determine whether libraries will become censors of public morality or will retain their traditional role in support of intellectual freedom.

This brief is submitted in the hope that it will persuade the Court, in the process of its review of the decision below, to define *scienter* in terms which will not require the suppression of constitutionally protected material and the violation of the First Amendment rights of librarians, publishers, authors and the society they serve.

The Association has obtained the written consent of both Appellants and Appellee to the filing of this *amicus curiae* brief.*

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* True copies of the letters evidencing such consent have been lodged in the Clerk's office.

ARGUMENT.

NO PERSON SHOULD BE INDICTED OR CONVICTED OF DISTRIBUTING OBSCENE MATTER UNLESS IT IS FIRST ESTABLISHED THAT SUCH PERSON SPECIFICALLY INTENDED TO DISTRIBUTE MATTER THAT HE KNEW OR BELIEVED TO BE LEGALLY OBSCENE.

It has been generally conceded that this Court in *Smith* v. *California*, 361 U. S. 147 (1959), established that "scienter, as opposed to a statutorily imposed absolute criminal liability, is a necessary and essential element where First Amendment rights are concerned." *U. S.* v. *Hamling*, 481 F. 2d 307, 318 (9th Cir. 1973). The purposes of the *scienter* requirement were defined by this Court in *Mishkin* v. *State of New York*, 383 U. S. 502, 511 (1966) in the following terms:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

If the purposes of the *scienter* requirement are to minimize self-censorship of constitutionally protected materials and to compensate for ambiguities inherent in the definition of obscenity, then the standards governing the application of the *scienter* requirement for obscenity prosecutions must be formulated to achieve these purposes.

We submit that these purposes cannot be achieved if the *scienter* requirement can be satisfied by a mere showing that the defendant knew the contents of a work. It is not mere "knowledge" but "guilty knowledge" which is the essence of *scienter*. *Morissette* v. *U. S.*, 342 U. S. 246, 252 (1951). And "guilty knowledge" can exist only where the defendant specifical-

ly intended to distribute matter that he knew or believed to be legally obscene.

To hold that mere knowledge of the content of the work satisfies the *scienter* requirement is to create a presumption of knowledge of its obscenity. Yet such a presumption would be completely inconsistent with the "presumption of innocence" upon which this Court has said we may rely in criminal obscenity prosecutions. *Miller* v. *California, supra,* 413 U. S. at 26.

A. If Mere Knowledge of Contents of a Work Constitutes Proof of Scienter, Then the Scienter Requirement Will Not Avoid the Hazard of Self-censorship of Constitutionally Protected Material.

If mere knowledge of the contents of a work ultimately held to be obscene can be the basis of prosecution and conviction, then every person engaged in the distribution of works having sexual content is exposed to criminal prosecution, regardless of the existence of conscious wrongdoing.

This exposure is particularly significant to libraries and librarians as well as to booksellers, authors and publishers.

Every library collection contains many works having sexual content. While it is true that this Court has declined to equate "sex" with "obscenity," *Roth* v. *United States,* 354 U. S. 476, 487 (1957), it is equally true that the difference can be established definitively only by a trier of fact applying the "contemporary community standards" of the "average person" in that community. *Miller* v. *California, supra,* 413 U. S. at 33.

A librarian, in the nature of his profession, cannot be ignorant of the content of the works in his collection. At the same time, nothing in his professional training or experience qualifies him to make the refined legal judgments required to distinguish those works which are "legally obscene" from those that are "constitutionally protected."

Nor can a librarian be compelled to make such a judgment at his peril or he will most certainly engage in the self-censorship which this Court has recognized will impede "the distribution of all books, both obscene and not obscene, . . ." *Smith* v. *California, supra,* 361 U. S. at 154. Given the prospect of criminal prosecution if he misjudges the "community standards," or the presence of "prurient appeal" or the existence of "serious values," the librarian will inevitably "err on the side of caution" in selecting books; perhaps eliminating all works having sexual content. Then too he will restrict the circulation of works in his collection to his own community whose "contemporary standards" are familiar to him. He will, in sum, establish precisely the form of self-censorship which this Court has described as "virulent." *Smith* v. *California, supra,* 361 U. S. at 154. Moreover, the censorship decisions of the librarian will be final and total restraints on the First Amendment rights they affect since they are not subject to any form of judicial review.

Librarians do not desire to become censors of the public morals. On the contrary, librarians philosophically believe that "censorship should be challenged in the maintenance of their responsibility to provide public information and enlightenment."* Yet, it is true that librarians have no economic incen-

* Philosophically, libraries and librarians are dedicated to the public's freedom to read, and to that end they seek to provide access to as broad and varied a spectrum of materials, expressing as many diverse and controversial positions, as their limited budgets permit. The American Library Association's "Library Bill of Rights," therefore, provides, in pertinent part:

"1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.

2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed or re-

tive which would justify the risk of their personal freedom in order to insure the widest, or, indeed, any distribution of a particular work. For this reason, the purging of libraries of all materials which under any interpretation might be deemed obscene is not merely a possibility but a probability unless this Court requires more than mere "knowledge" of a work's contents as proof of *scienter* in a criminal prosecution.

The effect of such a purge on the First Amendment rights of citizens would not be confined to the community served by any given library. The larger effect would be to destroy libraries as a national intellectual resource. After years of concerted effort, with substantial government support and encouragement, the libraries of the Nation have been tied together through library systems and interlibrary loan programs. As a consequence, the circulation of works in a library collection is not restricted to a single "community" regardless of whether the community is defined as a city, township, county or state.

The development of library collections as a "national intellectual resource" has permitted the maximization of library funds, has permitted the development of broader collections, and, perhaps most important, has given the patron of the smallest library in the most remote part of the country access to the collections of all libraries. In a true sense, the "community" has become an irrelevant concept in identifying access to library collections.

But if access to library collections is not limited to the "community" in which they are located, how then can the library collections be limited to those works which satisfy the "con-

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moved from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

temporary standards of that community?" On the other hand, if access to library collections is limited to the "community," how then can such collections continue as a "national" intellectual resource?

If, as this Court has held in *Miller* v. *California, supra,* 413 U. S. at 31-32, there are no "national standards" to "determine whether certain materials are obscene as a matter of fact . . . ," how then may a librarian permit any work in his collection containing sexual matter to be circulated beyond his community? Inter-library loan programs are conducted primarily through the mails. If there are no "national standards," what local standard will be applicable; the standards of the community from which the work is mailed or the standards of the community in which it is received?

These are not hypothetical questions to the librarian. They are real questions, the answers to which will determine the future of library service in this country.

B. If Mere Knowledge of Contents of a Work Constitutes Proof of Scienter, Then the Scienter Requirement Will Not Compensate for the Ambiguities Inherent in the Definition of Obscenity.

When this Court in its June 21, 1973 decisions abandoned the quest for national standards and ruled "obscenity" to be a function of geography, it compounded the ambiguities inherent in the definition of obscenity. When it held that:

> "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Miller* v. *California, supra,* 413 U. S. at 33,

it approved definitions of obscenity which may vary from place to place, from time to time, from jury to jury, and from judge to judge. Moreover, with the recognition that ". . . the mode of distribution may be a significant part of the determination of

the obscenity of the material involved. . . .," *Ginzburg* v. *U. S.*, 383 U. S. 463, 474 n. 15 (1966), the Court has explicitly recognized that non-obscene works may sometimes be obscene and by implication that obscene works in some contexts may be constitutionally protected.

The ambiguities inherent in the definition of obscenity have been repeatedly recognized by members of this Court. Thus, Mr. Justice Black, dissenting in *Ginzburg* stated that "human beings, serving either as judges or jurors, could not be expected to give any sort of decision" concerning prurient interest "which would even remotely promise any kind of uniformity in the enforcement of this law." 383 U. S. at 478-79. Justice Black further stated:

> "My conclusion is that . . . no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today." 383 U. S. at 480-81.

To the same effect is the conclusion reached by Mr. Justice Brennan, dissenting in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973), where he said

> ". . . The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." 413 U. S. at 92.

To compensate adequately for these ambiguities in the definition of obscenity, proof of *scienter* requires nothing less than proof of a specific intent to distribute matter known or believed to be legally obscene.

Without such a requirement, the Court has constituted the distribution of obscenity a crime where liability is absolute and intent irrelevant.

We submit that the evils of obscenity are not such as to warrant this Court in construing the distribution of obscenity as criminal *per se*.

This Court has held that "the separation of legitimate from illegitimate speech calls for . . . sensitive tools . . ." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). Absolute criminal liability can hardly be construed as a "sensitive tool."

C. A Requirement of Specific Intent to Disseminate Materials Known or Believed to Be Legally Obscene Would Not Unreasonably Limit the Regulation of Such Materials.

This Court has observed that the mere threat of criminal prosecution may be sufficient to prohibit the circulation of constitutionally protected publications. As the Court stated in *Bantam Books* v. *Sullivan*, 372 U. S. 58, 68 (1962):

> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, . . ."

As a consequence, this Court on a number of occasions has undertaken to enjoin such threats by chiefs of police or prosecutors. *Id.* at 67 n. 8.

Recognizing the potential which the threat of criminal prosecution has for the abuse of First Amendment rights, this Court has repeatedly approved those state obscenity statutes which require a judicial determination of the obscenity of the work in question in a civil proceeding prior to any criminal indictments. *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 55; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441-444 (1957). As Mr. Justice Burger stated, " . . . such a procedure provides an exhibitor or purveyor of materials the best possible notice prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U. S. at 55.

Mr. Justice Frankfurter described the advantages of a prior civil proceeding on the issue of obscenity in these terms:

> "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity." *Kingsley Books, Inc.* v. *Brown, supra,* 354 U. S. at 442.

We submit that a "requirement of specific intent to disseminate materials known or believed to be legally obscene" would encourage a greater use of the civil proceeding endorsed by this Court to determine obscenity. Such a proceeding would compensate for ambiguities in the definition of obscenity and would eliminate the hazard of self-censorship of constitutionally protected materials.

Librarians desire only to include in their collection works which they may legally acquire. Hence, self-censorship is unnecessary if they can be advised, through a non-criminal proceeding, of the works which are legally obscene and therefore prohibited to them.

Nor would such a requirement unduly hamper the enforcement of obscenity laws. The basic purpose of such laws is to inhibit the distribution of obscene materials without inhibiting the distribution of constitutionally protected works. The civil proceeding, involving where necessary, injunctive relief, has been widely used and has been generally effective. Moreover, and perhaps most significantly, it provides the rigorous procedural safeguards required by this Court. *Blount* v. *Rizzi,* 400 U. S. 410, 417 (1971); *Freedman* v. *Maryland,* 380 U. S. 51, 58-59 (1965); *Kingsley Books* v. *Brown, supra,* 354 U. S. at 443-445.

D. The Court Below Improperly Relied on Rosen v. United States (1896) Because That Decision Was Rendered Before This Court Recognized Scienter As a Constitutional Requirement in Obscenity Prosecutions.

The Court below upheld the trial court's refusal to require the government to prove that "the appellant must have had a specific intent to mail what he knew and believed to be obscene literature." It did so in reliance on this Court's decision in *Rosen v. United States*, 161 U. S. 29 (1896).

We submit that this reliance was misplaced and that the *Rosen* decision, *supra*, does not properly state the law. The assertion in 1896 that:

> "Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." 161 U. S. at 42,

is simply inconsistent with the realities of modern life and the experience of this Court. If "everyone" *could* "take notice of what . . . must be deemed obscene, lewd, and lascivious," the decisions of June 21, 1973 and all of this Court's previous attempts to define "what everyone should know" have been unnecessary.

Moreover, this Court specifically stated in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 492 (1962) that

> ". . . Congress has required *scienter* in respect of one indicted for mailing material proscribed by the statute."

The statute involved was 18 U. S. C. Section 1461, the same statute under which Appellants were indicted and convicted. Section 1461 is substantially the same as the statute which was construed in *Rosen, supra.*

The *Rosen* decision did not recognize the requirement of *scienter*. On the contrary, the Court specifically stated that:

". . . The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd and lascivious was recognized as the test for determining whether the statute has been violated . . ." 161 U. S. at 41-42.

While we would agree that the belief of the accused is irrelevant to the issue of whether or not matter is legally obscene, we cannot agree that such belief is not a reasonable and proper test to determine whether the accused has violated the statute. If *scienter* means anything, it means something significantly more than mere knowledge of the contents of a work. *Manual Enterprises, Inc.* v. *Day, supra,* 370 U. S. at 494-495.

CONCLUSION.

We submit that *scienter*, if properly defined, is the "sensitive tool" by which this Court can separate "legitimate from illegitimate speech," *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958), can avoid the hazards of self-censorship and compensate for the ambiguities in the definition of obscenity, *Mishkin* v. *State of New York,* 383 U. S. 502, 511 (1966).

If this Court holds that *scienter* requires proof of a specific intent to distribute matter known or believed to be legally obscene, prosecutors will be greatly encouraged to establish the "obscenity" of a work before instituting criminal proceedings. As a consequence, librarians, authors, publishers, and booksellers will not be compelled to engage in self-censorship. They will know the works prohibited to them. This in turn will eliminate, or at least minimize, the risk that the ambiguity inherent in the definition of obscenity will cause a person to "be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss,* 347 U. S. 612, 617 (1954).

Such a *scienter* requirement would further discourage the use of criminal prosecution as a means whereby public officials can coerce the suppression of constitutionally protected materials without the judicial review which this Court has mandated. *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971); *Freedman* v. *Maryland*, 380 U. S. 51, 58-59 (1965).

At the same time, the objectives of the obscenity laws would be achieved, although not perhaps through the eye-catching headlines which attend criminal prosecutions. Obscene works could still be identified, distribution could be enjoined or controlled, and persons persisting in distributing works established as obscene could be prosecuted vigorously and with reduced chance of error.*

Librarians, booksellers, authors and publishers could engage in their profession or business without keeping "one eye on prosecutors or juries," *U. S.* v. *Roth*, 237 F. 2d 796, 825 (2d Cir. 1956), and libraries could remain a national intellectual resource free to participate in library systems and interlibrary loan programs without peril.

In sum, a *scienter* requirement which requires "guilty knowledge" for prosecution and which protects "those who were not blameworthy in mind from conviction," *Morissette* v. *U. S.*, *supra*, 342 U. S. at 252, would resolve or make irrelevant most of the issues which have confounded this Court for so many years in its consideration of "obscenity" and the First Amendment.

Amicus respectfully submits that the Court should reverse the decision of the Court of Appeals for the Ninth Circuit and, in

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* Furthermore, nothing is to prevent the state from adopting reasonable "time, place and manner" regulations which may be deemed necessary. *Cox* v. *Louisiana*, 379 U. S. 536, 554-555 (1965).

so doing, establish specific intent as the indispensable element of the *scienter* constitutionally required for a permissible obscenity prosecution.

Respectfully submitted,

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